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Going Too Far

The president needed the Intelligence Oversight Act.

Congress has never really said exactly how far the president can go in foreign policy. But given a concrete event, Congress has occasionally said the president went too far.

It is specific events—decisions and actions by the executive branch, reviewed by the American people and their representatives in Congress—that have forced the debate over presidential authority. And it is the perceived abuse of presidential authority that has led to a narrower interpretation of that authority by Congress—not congressional arrogance or irresponsibility.

Not-too-distant history is ripe with examples of those abuses: in assaults on the constitutional rights of Americans by intelligence agencies in the 1950s and 1960s, covert actions in Angola and Chile, and the inept and overly secret preparation for the Iran rescue mission. Presidents have repeatedly gone too far in exercising their authority to carry out covert operations with our intelligence agencies—covert operations that were either ill-conceived or ill-executed—and secret operations that either violated our laws or contravened the will of Congress and the American people.

Thus, the Intelligence Oversight Act of 1980 did not spring whole from the head of Congress. It grew over time in response to actions by an executive branch that went too far. But intelligence oversight by Congress does not stand only on the potential it holds for curbing abuses by the executive. Equally important are the consultative values of oversight—to test and improve the quality of decisions and actions and to broaden the base of support under these decisions and actions.

The Intelligence Oversight Act was not written, in other words, to prevent the president from acting covertly. Indeed, it reduced the number of committees to which such activities must be reported. What it was written for was to prevent the president from carrying out a covert action without informing the oversight committees. It was to ensure that the committees could judge independently the necessity, appropriateness, wisdom and legality of the secret operation being proposed.

This independent judgment by the intelligence committees need not second-guess the president or expose a secret operation to the danger of being compromised. It is meant to improve the opportunity for the success of a risky operation and share with the president the burden of taking that risk.

The Intelligence Oversight Act was written to ensure that the president's ability to act would not be limited in any way by this requirement to inform Congress. There is a provision in the law, for example, for the president to act first—where time is of the

essence—and inform the committees in a "timely manner." The law would not be limited by the need to keep an action secret. There is a provision in the law for him to inform only the chairmen and vice chairmen of the intelligence committees and the Senate and House majority and minority leaders—a total of only eight people in whom the president should be willing to place his trust.

The Intelligence Oversight Act could not resolve the question of the limits of constitutional powers of the president. But congressional understanding of that reality is clear in the legislative history of the act.

"Nevertheless," said Sen. Robert Byrd in debating the act on the Senate floor in 1980, "the president bypasses the procedural provision of this bill and moves into this gray, constitutional buffer zone at his peril. This is because the presumption of this bill is that prior notice must be given to Congress, period."

So now, with this president's recent initiatives in Iran, we have a new event in the history of intelligence oversight. Once again, a president had chosen to carry out a covert action—however well motivated—that is considered by a great majority of Americans to be ill-conceived, ill-executed or both. But this time, the president's act is also in direct contravention of at least the intent of the Intelligence Oversight Act. And in the words of Byrd, the president had moved into the "gray, constitutional buffer zone" and is, indeed, "in peril."

That peril, of course, is that Congress will move further to restrict the president's latitude of action in foreign affairs, to narrow the scope of presidential authority by expanding and tightening the "what and how" definitions and requirements of the Intelligence Oversight Act.

Those of us in the business of intelligence oversight do not approach this task of considering further limitations in presidential authority with relish. In troubled and complex times, we need a strong, flexible executive with the authority to act quickly and secretly when the situation requires it. We wish the recent events involving Iran had not occurred—that the president and his advisers had trusted the proper members of Congress and met their obligations to make the oversight process work. But we also have an obligation to the American people to make oversight work whether the president wants it or not, and we will exercise our legislative authority—our constitutional power—to fulfill that obligation.

The writer, a Republican senator from Minnesota, is outgoing chairman of the Senate Intelligence Committee.